APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

In Equity, No. 557

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

In Equity, No. 558

EAST CHICAGO DOCK TERMINAL COMPANY

vs.

UNITED STATES OF AMERICA ET AL.

MEMORANDUM OPINION BY THE COURT

(January 23, 1937)

These actions were brought under 38 Statutes 219 (28 U. S. C. A., Section 41, subsections 45, 46, 47) and under the general equity jurisdiction of this court.

Cause No. 557 is an action to enjoin the Interstate Commerce Commission and the United

States of America from enforcing the terms of a cease and desist order, and for a decree adjudging the order void. Cause No. 558 demands the same relief and in addition thereto seeks to restrain and enjoin the respondent carriers in that case from taking action under the same order of the Commission.

The challenged order was promulgated by the Commission on May 14, 1935, and cessation of the condemned acts was ordered on or before July 15, 1935. Interlocutory injunctions *pendente lite* were issued and the causes were consolidated for hearing.

The East Chicago Dock Terminal Company, referred to for convenience as the Dock Company, for several years has been engaged in the operation of docks and a terminal at East Chicago, Indiana, which are served by the respondent carriers. Carload freight is shipped and received over those docks and to and from that terminal by numerous owners, shippers and receivers who are patrons or customers of the Dock Company, which likewise ships and receives carload freight to and from the docks. Those shipments move over the lines of respondent carriers in interstate commerce.

The Elgin, Joliet & Eastern Railway Company, referred to for convenience as the Elgin Railway, owns and operates a belt line of railroad around the city of Chicago, known as the outer belt. Pursuant to pertinent statutes, and rules of the Commission, it published tariffs with the Commission showing its rates for the transportation of goods between points therein named, in consideration of which it undertook to place cars at the respective points where the shippers and consignees desired

them placed for loading or unloading. In certain cases it found it desirable not to complete, itself, the placing of the cars at the desired points for loading or unloading, and in such cases it provided, in a properly published tariff, that it would pay the shipper or receiver of the freight a certain amount for performing the completion of such spotting service. Such a payment is commonly called an "allowance." This latter relationship existed between the Dock Company and the respondent carriers at the time this controversy arose, and had so existed for a long time. It was a practice which had become prevalent with certain railroads in parts of the nation, and had been approved by the Commission as well as by our highest courts.

In 1931 the Commission, of its own motion and without complaint from any railroad, shipper or consignee, entered upon a general investigation of the terminal service performed by railroad companies throughout the United States. As a result of that investigation, it made a general report in which it announced what it termed "principles." Among those, it declared that in the delivery or receipt of goods at a plant of an industry by a carrier, any service beyond a point on the plant where interference in the service might occur, or beyond a reasonably convenient interchange track, or in excess of the service required in making a simple placement or the equivalent of team track spotting, was unlawful.

The Commission also made a special report with respect to the Elgin Railway and the Dock Company, which contained the following pertinent language:

We find that the interchange tracks described of record are reasonably convenient points for the delivery and receipt of carload freight; that the transportation service for which the respondent carriers are compensated in their line-haul rates or switching charges begins and ends at said interchange tracks; that the service performed by the terminal company beyond those points is a plant service; and that by the payment of an allowance to the terminal company for service performed beyond the interchange tracks on interstate shipments, respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally and refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act.

This report was accompanied by the following order:

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the allowance paid by the Indiana Harbor Belt Railroad Company, the Elgin, Joliet and Eastern Railway Company, The Pennsylvania Railroad Company and the Baltimore and Ohio Chicago Terminal Railroad Company, to the East Chicago Dock Terminal Company, for performance by the latter of spotting service within its plant at East Chicago, Ind., and the Commission having on the date hereof, made and filed a report containing its legal conclusions with respect to the general situation presented, and also having on the date hereof made and filed a supplemental report containing its findings of fact and conclusions with respect to the allowance paid to the

East Chicago Dock Terminal Company, which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that by the payment of said allowance, the above-named respondent carriers violate the Interstate Commerce Act as set forth in the above-mentioned reports:

It is ordered, That the Indiana Harbor Belt Railroad Company, the Elgin, Joliet and Eastern Railway Company, the Pennsylvania Railroad Company ,and The Baltimore and Ohio Chicago Terminal Company be, and they are hereby notified and required to cease and desist on or before July 15, 1935, and thereafter to abstain from such unlawful practice.

The question here presented is whether the Commission had jurisdiction to enter this order.

Plaintiffs' argument is premised upon certain fundamental and primary rights of railroads which we concede:

1. They are permitted to make special contracts and to generally manage their interests upon the same principles as other trades and pursuits, subject, however, to the exceptions that their charges for transportation may not be unjust, unreasonable discriminatory or otherwise unlawful. 2. A railroad is entitled to initiate rates, and to adopt such policy of rate making as to it seems best, and it may undertake to transport goods over its railroad for any person upon agreed terms as expressed in published tariffs, subject to the limitations heretofore referred to.

Whether a published tariff rate is unjust, unreasonable or discriminatory is a matter which the Interstate Commerce Commission by law has been

empowered to determine under the existing facts and conditions. This determination is subject to review by the courts, except as to matters of fact which are supported by substantial evidence. From a perusal of the original Interstate Commerce Act of 1887 (24 Stat. 379) and its many amendments to date (49 U. S. C. A.), it is obvious that its principal objects were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freights. *Interstate Commerce Commission* v. *B. & O. Railroad Company*, 145 U. S. 263.

The publication of tariffs by the carriers is authorized by section 6 of the Act. Section 1 (14) provides that the Commission may, after hearing, establish rules, regulations and practices with respect to car service by carriers by railroad subject to the Act. The Commission, by section 12 (1), is authorized to inquire into the business management of all carriers subject to the Act, and to enforce the provisions of the Act. Section 13 (2) empowers the Commission to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, or concerning which any question may arise under any provisions of the Act, or relating to the enforcement of any of its provisions, and to make and enforce any order or orders in the case, or relating to the matter or thing con-

cerning which the inquiry is had. Section 15 (1) provides that before the Commission may make a cease and desist order, it must first reach the conclusion that a rate or practice is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act. Section 15 (13) provides that if the owner of property transported renders any service "connected with such transportation" the charge or allowance therefore shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable maximum charge for such service, and fix the same by an appropriate order. Section 15 (14) provides that the enumerated powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of the Act.

It is first contended by plaintiff that the Commission's authority to make the order, which they deny, must be found, if at all, in Section 15 (1) of the Act which so far as pertinent to the questions here involved is set forth:

> Whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers * * * or that any individual or joint classification, regulation or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this

> chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, * * * and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Under this section, it is obvious that before the Commission can act, it must first reach the conclusion that a rate or practice of the carrier is or will be unjust or unreasonable, unjustly discriminatory, unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act.

Plaintiffs' argument assumes with certainty that the so-called spotting services involved in these controversies constituted transportation within the meaning of the act; that the railroads were lawfully bound to perform those services under their contractual obligations of the published tariffs, and that the tariff rates must be considered as just and reasonable compensation for such services, and un-

discriminatory until the Commission find to the contrary.

With this contention we are unable to agree. It is quite true that section 1 (3) of the Act, 49 U. S. C. A. 1 (3), provides that "The term 'transportation' as used in this chapter shall include * * * all services in connection with the receipt, delivery * * * and handling of property transported," but we cannot believe that it was the intention of Congress that a railroad having received a shipment or an order for empty cars and having transported either to the premises of the consignee or shipper ready for delivery, should, without fault on its part, be compelled to stand by for many hours and perhaps days in order to place the cars for loading or unloading at the particular place and at the particular time most advantageous to the needs of the consignee or shipper. It is true that the courts have held that the place of delivery means the point of loading or unloading, but we are convinced that this construction must be interpreted to mean that there shall always be accorded to the carrier a reasonably immediate access to the point of loading or unloading. Otherwise, the burden placed upon the carrier in many instances would be most inequitable. The growth of industries and the extension of plant areas with their networks of private railroad tracks where many cars are continuously needed for loading and unloading have made it necessary in many instances to have a switching engine continuously present. In comparatively recent years, therefore, the question has frequently confronted the courts and the Commission as to whether the switching done by an industry within its own plant, between the inter-

change or storage tracks and its loading or unloading platforms is work that the railroad is required to do as a part of transportation. In *American Sheet & Tin Plate Co. et al* v. *United States,* decided May 23, 1936, by a three-judge court in the Western District of Pennsylvania, it was stated, "There appears to be no exact formula that can be applied in answering this question. The most we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable."

In that case the court held that the spotting terminal switching service there involved was a transportation service which the railroads were by law required to perform. It further said, however, that while spotting service is transportation within the statutory definition and was a common carrier service up to certain limits, yet it did not "include special or particular spotting service as described in *New York Central & Hudson River R. R. Co.* v. *General Electric Company,* 114 N. E. 115, over an intricate system of trackage when the railroad is not permitted to enter to extend any 'spotting service' at all." The opinion then sets forth the following "typical circumstances" which would relieve the carrier from the duty of spotting: "(a) where an industry refuses to permit the railroad to enter upon the private industrial tracks; (b) where the physical condition and layout of the private industrial tracks will not accommodate the carriers' locomotive power without hazard or *excessive delay;* (c) the industry occupies large areas with many scattered plants, connected by an intricate system of industrial tracks and *used chiefly as*

industrial facilities." [Our italics.] This language clearly implies that there may be other circumstances closely analogous to the types mentioned which also might thus limit the carriers' duty. Obviously, the question propounded is one of fact which constitutes the basis for that court's rational conclusion that no exact formula can be applied in answering it.

The provisions of the Act, both express and implied, convince us that it is the duty of the Commission primarily to answer this question and its answer cannot be controverted by the courts, if it is based on substantial evidence. In the case just referred to, the court said, "* * * we find no circumstances which would relieve the carriers involved from the duty of 'spotting' the cars as a part of the transportation imposed on them by law." We think that statement is tantamount to saying that the Commission's factual conclusion to the contrary was not supported by substantial evidence. This being true, and not within our province to dispute, it logically follows that the court was correct in concluding as a matter of law that "the Commission was without power to prohibit entirely allowances for doing spotting services."

Many cases have been cited by the parties herein concerned, but they are not directly decisive of the question before us because of the varying respective conditions. We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable.

While no exact formula can be applied, yet certain principles can be followed which will be both helpful and equitable as applied to all cases. We think it was within the province of the Commission under the Act to promulgate and enforce the principles which they announced, as hereinbefore referred to. They seem to us to be fair, and are sufficiently flexible in their application to cover all cases, and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible.

It is urged by plaintiffs, however, that the deliveries and the allowances therefor, which are the subject of the order, are both customary and reasonable. With respect to the custom, the record discloses that some carriers follow it and some do not; in some territories it is followed and in some it is not; with respect to some industries it is practiced by some carriers, and with respect to other industries it is not; some industries do their own plant switching, others do not; of those who do, some receive allowances therefor from the carriers, many more do not. Obviously, there was substantial evidence to support the conclusion that there was no general custom. Moreover, if any or all of the carriers, either voluntarily or by coercion, had submitted to the practice of rendering services under the guise of transportation services, which in reasonableness and in good faith could not be considered as a part of transportation, a continuation of that practice would never amount to a custom upon which the industries could claim a vested right of its continuance, for in that event the custom would be an unreasonable one, and any allow-

ance therefor would likewise be unreasonable, nor would the custom or the lack of reasonableness and validity be aided in any way by the proposals in the tariff publications.

It is true that the Commission made no finding or conclusion that the allowances for what it termed "plant services" constituted unreasonable compensation for such services. It was unnecessary to do so because it found that all such services were unlawful. Hence they were inherently unreasonable and unjust by reason of their unlawfulness. For the same reason, it was unnecessary for the Commission to specifically find that the rates were discriminatory.

The matter of findings of the Commission is covered by section 14 (1) of the Act: "Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made." In these cases no award of damages was made. The supplemental report finds all important basic facts, such as physical location and arrangement of plant, plant tracks, carriers interchange and other tracks, actual conditions of operations and all pertinent circumstances relative to the physical movement of cars. From these reported facts the Commission found that the spotting of cars within the plant was a plant service and was not transportation within the meaning of the Act. We think this was a compliance with the statute.

We are further convinced that the order is supported by substantial evidence, and that the evidence constitutes a sufficient basis for the Commission's conclusions. *Los Angeles Switching Case*, 234 U. S. 294; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444; *New York Central & Hudson River R. R. Co.* v. *General Electric Co., supra.*

It is to be noted that neither complaint alleges that the basic facts found are without support of evidence, or that they are not proved, or are inaccurately stated by the Commission. The alleged insufficiency of evidence is limited to the claim that there is no evidence to support the conclusions. We think this allegation has not been established. The argument in support of it is quite largely based on the premise that the obligation to spot cars is a legal one. As a general rule we accept that premise; however, we think it must always be subject to the limitations placed upon it by the reasonable principles promulgated by the Commission in the interpretation of the statute which defines "transportation." We think those principles do no injustice to the statute, and the order should be upheld.

The Commission's order is within its statutory authority; the findings are sufficient to support its order; the findings are supported by substantial evidence and the order should be sustained.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

In Equity, No. 4853

GOODMAN LUMBER COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled suit was brought under the Act of Congress of October 22, 1913 (38 Stat. L. 219, 28 U. S. C. A. Secs. 41, 45, 47, 47a) to enjoin an order of the Interstate Commerce Commission requiring the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to discontinue payments to plaintiff for the switching and "spotting" of cars within its industrial plant at Goodman, Wisconsin. The case was heard upon a record consisting of the pleadings and the testimony and exhibits submitted to the Commission, and other evidence.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a corporation with office and place of business located at Goodman in the Eastern District of Wisconsin. It there operates a manufacturing plant which is served by a common carrier engaged in interstate commerce.

2. Upon the Commission's own motion, it instituted an investigation "into practices of carriers affecting operating revenues * * * which * * * was divided into different parts." Part II of the proceeding related to the "spotting" of cars at industries. The Commission reported (209 I. C. C. 11, 15):

> Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:
>
> 1. Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform.

3. After hearings the Commission, on May 14, 1935, issued its first, or "main" report (209 I. C. C. 11), in which it discussed generally the historical and legal aspects of the "spotting" service and reviewed and discussed generally the facts disclosed in the record before it.

4. The allowances paid by the railroad to the particular industry receiving them are generally published in tariffs, and are allowed and paid on the assumption that the spotting service is a "transportation" service, for performance of which the carriers receive payment in the line-haul rates and the industries are therefore entitled to compensation under the provisions of section 15 (13) of the Interstate Commerce Act. A tariff schedule covered the allowance paid to the plaintiff.

5. The Commission issued no order at the time of its main report, but announced certain principles concerning the payment of allowances to industries for performing spotting service at their industrial plants, or performance of such service by railroads in lieu of payment. (See Report.)

6. The testimony showed that numerous industries referred to in the proceeding are neither accorded plant-spotting nor paid allowances. (209 I. C. C. page 16.) The testimony shows that there is no uniform custom or practice of railroads or shippers generally over the country with respect to the performance of the "spotting" service or of payment of allowances therefor.

7. Following its main report the Commission issued separate supplemental reports and with each supplemental report it issued its order directing the carrier or carriers to cease and desist from paying allowances to the industry for performing its own spotting service or from performing the service for the industry without charge in addition to the line-haul rates. The specific order involved in the case at bar appears at 214 I. C. C. 84.

8. The allowance involved has been, and is, paid by the carrier to the Goodman Lumber Company

for the performance by the latter of spotting service within its plant and the plant of the Cliffs Chemical Company. The last-named company operates a plant lying to the south of the lumber company and some of the stockholders of the lumber company are also stockholders of the chemical company and one or more officers serve both companies, though the chemical company is not a subsidiary of the lumber company. Both industries are served by a system of tracks aggregating six miles in length located upon the property of the industries, the industries maintaining the tracks within the plants and furnishing the ties therefor and the railroad owning the metal. The carrier does not use these tracks to serve any other industry. There are also approximately six miles of additional tracks owned by the two industries which are used in plant service and to some extent in bringing in logs from the woods. There is very little inbound traffic over the carrier's line. Logs are hauled in by the lumber company. At the time of the hearing the daily outbound carloads ranged from one to five. The carrier has never maintained a switching engine at Goodman, all cars being set out and picked up by its local freight trains and crews on the interchange tracks hereinafter described.

Beginning June 1, 1912, under a verbal agreement, the carrier paid the lumber company an arbitrary amount of $200 per month intended to cover the expense of the lumber company in performing the terminal switching. Interchange was made on two tracks on the carrier's property just off its main line. This arrangement was canceled March 1, 1924, by the railroad upon the theory that the

payment of the terminal allowance was prohibited by a Wisconsin statute. Thereafter the carrier began delivering and picking up cars on four stub-end tracks on the property of the lumber company which are extensions of the tracks on which the traffic was interchanged prior to March 1, 1924. This practice continued until April 1, 1925, when the performance of the interchange service was resumed by the lumber company on the two tracks hereinabove mentioned, for the reason that the lumber company had requested a terminal allowance for which it agreed to perform all the switching. A cost study covering a two-week period in April, 1929, indicated that the interchange service cost the industry 95 cents for each loaded car. This study also showed that 25.48 percent was interchange switching and the balance intraplant switching. On November 12, 1929, a written agreement was entered into between the lumber company and the carrier, under which the lumber company was to perform the necessary service in moving the loaded and empty cars to and from points of loading and unloading both at its plant and that of the chemical company. This service was in excess of that previously performed by the carrier. On July 5, 1930, the allowance to the lumber company was published in tariff form. In making deliveries to the chemical company it was necessary to take traffic from the interchange points through a series of tracks of the lumber company to a point near its southern extremity, then back haul it to the chemical company.

Effective April 23, 1931, the allowance was canceled as to the intrastate traffic because of the enactment of a state statute. The payment of the 95-cent allowance was continued on interstate traf-

fic, the lumber company continuing to perform the spotting on both interstate and intrastate traffic. The lumber company refrained from requesting the carrier to do the spotting of intrastate traffic subsequent to April 23, 1931, because the operation of the carrier's locomotives within the plant the same time the company's locomotives were operating would be apt to occasion danger, delay and interference. The same switching service is performed on both interstate and intrastate shipments. The service for which the allowance is paid is in excess of ordinary team track or simple switch placement. Because of the operation of logging trains within the lumber company's plant, more danger and delay to traffic would be encountered if the carrier should undertake to perform the spotting as the locomotives would interfere with each other. The spotting service by the carrier would require the use of a switch engine whenever desired by either of the industries.

The Court finds that the above-stated findings of the Commission were supported by substantial evidence in the record before it, and concurs in and adopts the same.

9. The physical arrangement of the plaintiff's plant and that of the Cliffs Chemical Company, and the plant tracks in connection with the carrier's line are correctly shown in a blue print or map introduced in evidence before the Commission and marked Exhibit B–1, Volume of Exhibits no. 4, page 1.

10. Upon the evidence the Commission concluded that the existing line-haul rates of the carrier must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that

the stub-end interchange tracks described in the record and hereinabove constitute such reasonable points; that the transportation service which it is the duty of the carrier to perform for the lumber company and the chemical company under the line-haul rates begins and ends at said interchange tracks; that the movements of cars by the lumber company between said interchange tracks and points within its own plant and that of the chemical company are industrial services which it is not the duty of the carrier to perform; that by the payment of the allowance for the service performed on interstate shipments beyond said stub-end interchange tracks; the carrier provides the means by which the lumber company enjoys a preferential service not accorded to shippers generally and refunds or remits a portion of the rates and charges collected and received by it as compensation for the interstate transportation of property in violation of section 6 (7) of the Interstate Commerce Act, which conclusions the Court finds are supported by substantial evidence and in which the Court concurs.

11. The Commission found that the transportation included in the published rates begins and ends at the said interchange tracks at Goodman, that the "spotting" service between those tracks and points within the plants is plant service and not transportation covered by the line-haul rates, and that by paying the allowance for the "spotting" service for said industries the carrier provides the means by which the plaintiff enjoys a preferential service and refunds or remits a portion of the published rates.

12. The Court finds that the evidence received by the Commission supports the findings made by the Commission.

CONCLUSIONS OF LAW

The Court finds:

1. The Commission's order is within its statutory authority.

2. The findings made by the Commission are sufficient to support its order.

3. The continuance of payment to the plaintiff under the circumstances would have been a discrimination.

4. The complaint should be dismissed.

(Signed) EVAN A. EVANS,
United States Circuit Judge.

(Signed) F. A. GEIGER,
United States District Judge.

(Signed) JOHN P. BARNES,
United States District Judge.

DECEMBER 4, 1936.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

In Equity, No. 4988

A. O. SMITH CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY (HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HEIGHT, TRUSTEES), DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Upon the evidence before it the court makes the following findings of fact:

1. The plaintiff, A. O. Smith Corporation, is a corporation with its principal operating office and plant at Milwaukee, Wis., where it is now and has for many years been engaged in the manufacture of automobile gear frames and other heavy metal articles. In the conduct of said business it receives and ships large amounts of material and finished articles by rail, in carloads. It brought this suit under the Act of Congress of October 22, 1913, to enjoin and set aside an order of the Interstate

Commerce Commission entered May 19, 1936, in a proceeding entitled A. O. Smith Corporation Terminal Allowance, Ex Parte 104, Pratices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, wherein the Commission ordered the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (co-defendant herein) to cease and desist from paying to plaintiff an allowance for the movement of cars beyond certain interchange tracks, described in the record herein, and the spotting thereof within the plant of said plaintiff. A copy of said order is attached to the petition (Appendix A).

2. The proceeding of the Interstate Commerce Commission is Part II of an investigation instituted July 6, 1931, upon the Commission's own motion "into practices of carriers affecting operating revenues or expenses," which for convenience was divided into different parts. Hearings were held in said proceeding pursuant to notice given by the Commission and much testimony and many exhibits were received, including evidence as to the practices of the railroads throughout the country with respect to the delivery of carload shipments of freight. The Commission also received evidence as to the plaintiff's industrial practices, the character and arrangement of its plant at Milwaukee and of the railroad tracks entering and within said plant, and the manner in which cars, loaded and for loading, were delivered to and taken from said plant. Said evidence also disclosed the history of the spotting service performed at the plaintiff's said plant and of the allowance therefor. An official of the plaintiff company appeared and testified at said hearing.

3. Following said investigation the Commission, on or about May 14, 1935, made and published its report (209 I. C. C. 11). On or about May 19, 1936, the Commission issued a supplemental report in said proceeding, the same being designated the "Fifty-third Supplemental Report," wherein the Commission dealt specifically with the terminal or "spotting" services rendered at the plaintiff's plant in Milwaukee aforesaid, and at the same time made and entered an order against the defendant railroad company, said supplemental report being attached to the petition herein as Appendix B.

4. The evidence before the Commission was sufficient to support the findings of the Commission and its order.

CONCLUSIONS OF LAW

The court concludes, as matters of law, that—

1. The Interstate Commerce Commission acted within its legal powers in instituting and conducting the investigation and proceeding which resulted in the order sought to be set aside herein.

2. The Commission's order is supported by substantial evidence.

3. The Commission was empowered to make the order complained of.

4. The findings of the Commission support its order.

5. The complaint should be dismissed.

Dated: December 5, 1936.

(Signed) EVAN A. EVANS,
United States Circuit Judge.

(Signed) F. A. GEIGER,
United States District Judge.

(Signed) JOHN P. BARNES,
United States District Judge.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

In Equity, No. 2856

KOPPERS COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY, RESPONDENTS.

MEMORANDUM OPINION

(April 1, 1937)

BELL, District Judge, delivered the opinion of the Court.

This is an action in equity brought by the Koppers Company, petitioner, against United States of America, Interstate Commerce Commission, Northern Pacific Railway Company and Great Northern Railway Company, respondents, to enjoin, annul and set aside an order of the Interstate Commerce Commission entered June 24, 1935, in a proceeding designated Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, which required the respondent carriers to cease and desist, on or before August 15, 1935, from paying al-

lowances to the petitioner for certain alleged terminal services. The cause was first heard on an application for an interlocutory injunction before a three-judge court composed of Honorable John B. Sanborn, United States Circuit Judge, Honorable Wilbur F. Booth, United States Circuit Judge, and Honorable Robert C. Bell, United States District Judge, under 28 U. S. C. A., Section 47, which was denied (11 F. Supp. 467). The cause was tried before the same court October 12 and 13, 1936.

Mr. John B. Keeler and Mr. Albert A. Mattson of Pittsburgh, Pennsylvania, and Mr. George W. Morgan and Messrs. Kellogg, Morgan, Chase, Carter & Headley for the petitioner.

Mr. Elmer B. Collins, Special Assistant to the Attorney General for the United States,

Mr. Edward M. Reidy for the Interstate Commerce Commission,

Mr. M. L. Countryman, Jr. for the Northern Pacific Railway Company,

Mr. R. J. Hagman for the Great Northern Railway Company, for the respondents;

Mr. Herman Mueller, Jr. for the National Industrial Traffic League, Intervenor.

The general report of the Commission in Ex Parte No. 104, will be found in 209 I. C. C. 11, and the supplemental report pertaining exclusively to the industry of the petitioner will be found in 209 I. C. C. 421 and following our opinion in 11 F. Supp. 470.

The petitioner contends: (1) that the findings of the Commission are not sufficient to sustain the order, (2) that the findings of the Commission are not supported by substantial evidence, and (3) that

the Commission abused its discretion in denying its petition for a rehearing.

The Commission contends that the reports and order were made after a full hearing, that they are based on substantial evidence and in all respects are regular, proper and lawful.

The carriers neither admit nor deny the reports and the order, but allege that in compliance with the order each of them filed a tariff effective August 15, 1935, providing for the withdrawal and cancellation of the allowances. They state that they would have continued in force their tariffs providing for the allowance except for the order of the Commission and that they are willing to reinstate such allowances if the order of the Commission is held unlawful.

The order, in effect, deprives the petitioner of an allowance of one dollar per car by the carriers for services rendered by it in switching and spotting cars within its plant at St. Paul, Minnesota. The Commission found that the services were not for the carriers, but were plant services performed by the petitioner for its own benefit and convenience and that the allowances were in violation of the Interstate Commerce Act, 49 U. S. C. A., Section 6 (7).

The interlocutory injunction was denied on the ground that the evidence on which the reports and order of the Commission were based was not before us and that we therefore did not have the power to question the findings of fact made by the Commission. We held that the order of the Commission was within the scope of its general powers, that it was made after a full inquiry, and that it is entitled to great respect as it represents the opinion

of a body of experts on matters within their special knowledge and experience.

The facts presented by the record are comparatively simple. The petitioner is and continuously since 1918 has been engaged in manufacturing coke at St. Paul, Minnesota. Its plant occupies a space more than 4,000 feet in length, more than 800 feet wide at the east end, and gradually diminishes in width to a narrow strip at the west end. The plant trackage is three and one-half to four miles in length, of standard gauge, has maximum curves of eighteen degrees, and leads to approximately twenty points, scattered throughout the plant, where freight cars are spotted for loading and unloading.

Petitioner's plant is served by the two respondent carriers, both of whom maintain yards on lands adjacent to and north of the west end of the plant. The Great Northern yard consists of three tracks from 1,000 to 1,100 feet in length, and the Northern Pacific yard consists of four tracks of approximately the same length. These tracks converge toward the railway entrance to the plant where one track from each yard connects with a tract owned by the petitioner. The carriers deliver ingoing freight cars on their respective tracks immediately outside the entrance to the plant where they are received and moved by the industry with its own power as desired to points within the plant for loading and unloading. Outgoing freight cars are moved as desired by the industry with its own power through the entrance of the plant into the yards of the carriers and there received by them. In other words, the yards or tracks of the carriers are used for interchange purposes and are desig-

nated in the record as "interchange tracks." The carriers have never performed the switching service for which an allowance has been made to the petitioner. The locomotives of the carriers do not enter the plant property. The switching between the interchange tracks of the railway companies and the points in the plant for loading and unloading is done by the industry with its own power and switching crews.

The industry receives an average of 25 carloads of freight daily, 95% of which is coal. A portion of the coal is switched to coke ovens and the balance to stock piles. That which goes to the ovens must be placed and unloaded at such times as it can be received in the manufacturing operations. Outbound shipments, mostly coke, fluctuate from 15 to 90 carloads daily.

It requires sixteen or more hours per day under normal conditions for a switch engine to perform the required service and from four to eight hours, depending on the volume of business, in moving cars to and from the interchange tracks. The operation of the carriers' locomotives within the plant for the purpose of spotting cars while the industry engine performs the intraplant service would be impracticable.

The average distance from the interchange tracks at the entrance of the plant to loading and unloading points is 1,200 to 1,400 feet, and to the most distant loading and unloading points is nearly 4,000 feet. Track scales are located at the railway entrance to the plant where the interchange tracks connect with the plant tracks. Both loaded and unloaded cars are weighed by the petitioner primarily for its own benefit, but at times use is made

of the weights by the carriers for fixing transportation charges.

From 1918 when the industry commenced operation, until February, 1922, the switching service was performed by the industry and no allowance was made. The payment of an allowance was suspended from March 1, 1927, to June 15, 1929, because there was a question as to the legality thereof due to the fact that there were no published tariffs covering such payments. Tariffs providing for a terminal service allowance of one dollar per loaded car were published and were in effect from June 15, 1929, to August 15, 1935, when the allowance was discontinued as a result of the order of the Commission herein involved.

The foregoing are the facts substantially as found by the Commission and there is little or no dispute as to their accuracy or that they are supported by substantial evidence. It is the conclusions of the Commission that meet with objection. The conclusions are as follows:

> Under the governing rules the carriers' duty with respect to delivery terminates at the point of interruption, in this case, the scales. In other words, respondents are prevented from performing the spotting service within this plant in an uninterrupted movement at their ordinary operating convenience, and have therefore, fulfilled their common-carrier obligation under the line-haul rates by the delivery and receipt of cars on reasonably convenient interchange tracks. * * *
>
> In fact, the spotting-service must be coordinated with plant operations, and to attain this objective the switching must be per-

> formed at such times as will meet the needs of the coke company. No obligation rests upon respondents to perform service beyond the agreed points of interchange solely at the convenience of the industry. * * *
>
> We find that the respondents have complied with their obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record; that the service beyond the interchange tracks is a plant service; and that by payment of an allowance to the coke company for the service performed by it beyond the interchange tracks on interstate shipments, respondents provide the means by which the coke company enjoys a preferential service not accorded to shippers generally, and refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act (49 U. S. C. A., § 6 (7).

The conclusions of the Commission contained in the first two paragraphs above quoted very properly may be designated conclusions of fact or of ultimate fact. The scales at the railway entrance or gateway of the plant were found to be the "point of interruption," not merely because cars are weighed at the scales, but because the trackage of the carriers is on one side of that point and the trackage of the plant is on the other side, and because up to that point the carriers can move cars without interruption and beyond that point the movement of the cars must be coordinated with the operations of the plant. After arriving at these conclusions of fact, the Commission found that transportation under the line-haul rates ended

with the receipt and delivery of cars on the interchange tracks, that the switching and spotting of cars on the plant trackage beyond the scales is a plant service that the carriers are not under an obligation to perform, and that any allowance to the petitioner for the performance of such service is discriminatory and unlawful.

The term "transportation" under Section 1 (3) of the Act, 49 U. S. C. A. 1 (3), includes all services in connection with the receipt, delivery and handling of property transported. Transportation includes delivery and whatever is necessary to complete delivery the carrier must perform. It is for performing this service that the carrier is paid under line-haul rates. If the carrier fails to make delivery and the consignee through its own instrumentalities completes the delivery, an allowance is proper. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274. When the carrier ends transportation by delivery, no allowance is due for service performed by the consignee beyond the point of delivery and an allowance under such circumstances would constitute an unlawful rebate. *Act of February 4, 1887*, 24 Stat. 379; *Act of February 19, 1903*, 32 Stat. 847; *Act of June 29, 1906*, 34 Stat. 584. The fundamental decisive question in this case is whether the spotting of cars for loading and unloading within the plant of the petitioner is a part of the transportation required of the carrier under line-haul rates, and this question depends on whether the service is customary and reasonable. *New York Central & Hudson River Railroad Company* v. *General Elec-*

tric Company, 219 N. Y. 227; 114 N. E. 115, certiorari denied, 243 U. S. 636.

In our opinion on the application for the preliminary injunction, we did not finally determine the question as to the sufficiency of the findings, but we said:

> It would seem that the main, essential, ultimate, basic fact to sustain the order of the Commission in this case is that the transportation service terminated at the gateway of the petitioner's plant. If that finding of the Commission is sustained by the evidence, then it would follow that the allowances provided for in the tariffs were gratuities paid to the shipper, and clearly preferential. * * *

The conclusions and findings of the Commission are definite, explicit, contain the facts decisive of the issues involved in the proceeding, and in our opinion are ample to sustain its order. Therefore, the first contention of the petitioner must be denied.

We now come to the more serious question as to whether the findings are supported by substantial evidence. Courts should exercise the greatest caution in disturbing the findings of an experienced administrative body made in the performance of its duties as prescribed by law. The credibility of witnesses, the weight of the evidence and the conclusions to be drawn therefrom in matters before the Interstate Commerce Commission are for it to determine; and its findings of fact will not be reviewed by the courts if supported by substantial evidence. *Merchants Warehouse Company* v. *United States*, 283 U. S 501; the *Assigned Car*

Cases, 274 U. S. 564; *Virginian Railway Company* v. *United States*, 272 U. S. 658; *Western Papermakers' Chemical Company* v. *United States*, 271 U. S. 268. In this connection the court in the Assigned Car Cases said:

> It is not for courts to weigh the evidence introduced before the Commission, *Western Papermakers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.*, 265 U. S. 533, 542. These are matters left by Congress to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.

A drawing of the plant and interchange tracks, exhibit B–8, is in evidence. It shows the location of the plant tracks, the buildings, coke ovens, coal piles, storage bins, structures of various kinds, and certain equipment of the industry; also the location of the interchange tracks of the carriers on adjacent property. It reveals a system of switching tracks and points for loading and unloading cars, a system that may be used for the continuous movement of a large quantity of coal into the plant and coke out, and that undoubtedly is used chiefly for industrial facilities. The exhibit presents physical facts showing a situation where several miles of tracks have been constructed and are main-

tained within the confines of a plant to serve an industry of considerable proportions and not to serve as railway terminals; and, furthermore, that the tracks of the carriers were constructed and are maintained on adjacent property to serve as railway terminals or interchange tracks for the benefit and convenience of the industry. While the size of the industry is not decisive of the question, the interruptions at a plant of extensive proportions with an intricate switching system for intraplant service necessarily would be greater than at the ordinary spur or siding.

The size and physical arrangement of the plant, the extent of its trackage, the situation governing the switching, the convenience and adequacy of interchange tracks are important basic facts to be considered in the determination of the question as to whether switching and car-spotting service is a part of the transportation required of carriers under line-haul rates or is a plant service. *New York Central & Hudson River Railroad Company* v. *General Electric Company,* supra; *Merchants Warehouse Company* v. *United States,* supra; *Los Angeles Switching Case,* 234 U. S. 294.

The Superintendent of Terminals of the Great Northern testified that the extent of the trackage in the plant is about 20,000 lineal feet and that there are twenty spotting points, that it would require the constant attention of a switch engine sixteen hours a day to perform the switching service required, that there is intraplant switching to be done, that by cooperation the interruption could be reduced to a minimum, that classification or a segregation of cars of various kinds of coal is necessary so that they may be spotted at the proper

unloading hoppers or stock piles, that the process of classification would result in interruption. This witness, in part, said:

> Q. Are we to understand that answer that this industrial operation must be fed in accordance with the requirements of the industry and their requirements in the spotting of the cars?
>
> A. I would say that to some extent, a large extent, that is true.
>
> Q. Would you say that if your company undertook to perform that service, having in mind both the inbound traffic and the outbound traffic, that it would necessitate the constant placement of a switch engine at the industry to take care of the inbound and the outbound loads?
>
> A. My study did not indicate that it would be necessary to have an engine constantly in attendance, but that to handle the plant properly and all the requirements in connection with it, that approximately 16 hours of the day, it would require the constant attendance of a switch engine service.
>
> Q. About what is the volume of the outbound traffic, expressed in numbers of cars per day?
>
> A. They would run from 15 cars to 90 cars a day during the year. It varies, of course. The winter time is the heavier business, in our experience.
>
> * * * * *
>
> A. Well, to take over the plant as it is today it would take at least four hours' time of an engine, but when this plant is operating continuously I am certain we would find it necessary to serve the plant at least twice a day and that would mean a total of 8 hours and not include any intraplant switching.

Q. And in addition to your serving that plant for eight hours a day with this engine, it would be necessary for the plant to have an engine of its own to do its intraplant switching?

A. Yes, sir, it would.

The Superintendent of petitioner's plant testified as follows:

Q. This service of placing the cars in positions accessible for loading and unloading at the plant, is that performed by the industry at the present time at times throughout the day that will meet the convenience of the industry?

A. Yes, sir.

Q. Or may it be done whenever the engine is ready to do it?

A. I might state this: We have a constant flow of coal and as a result we have a constant flow of coke. If we have 25 cars of coal today and we make about 30 cars of coke a day, the coal is unloaded in an 8 hour period, and the coke is made in a 24 hour period. We have bin capacity sufficient for the coke, so that probably you would hold up four hours' production.

Q. That is to say if the railroad power entered your plant to do that work, they might lack a set-up in the going that might hold up your plant moving for four hours, is that what you mean?

A. Yes, they could do it, provided they got the proper grade of coal at the right time, they could do it in two hours.

Q. That coal would have to be classified and graded according to the production?

A. Yes, sir.

Q. Your own industrial power does that grading at the present time?

A. Yes, sir.

* * * * *

Q. And if both railroads undertook to serve your plant and spot their own cars, that is, the Great Northern Power spot the Great Northern traffic and the Northern Pacific spot the Northern Pacific traffic and your industry engines performed the intra-plant service, how would that work out?

A. That would be like a crazy-quilt.

Q. It could not be done?

A. It could not be done. There would have to be an arrangement, or we would have to get all cars to use only one road.

* * * * *

Q. Why do you weigh the empty cars?

A. We find there is a very great difference from the stenciled weight and the light weights that we have. They run as much as four or five hundred pounds different.

Q. You do not do that for the convenience of the railroad, do you?

A. No, sir.

Q. That is for your own convenience?

A. For the convenience of ourselves and our customers of coke.

Q. So you weigh the inbound cars for your convenience and not for the convenience of the railroads?

A. I would say for our convenience on loss of weight, most of it is for our own convenience.

Q. Are all your cars weighed inbound?

A. Yes, sir.

It is significant that the Superintendent of the petitioner's plant testified that "an arrangement" would be necessary to enable the carriers to render

the service now performed by the industry. In effect, he admitted that the situation in the plant is such that the carriers cannot enter it to deliver and receive cars except in accordance with an arrangement, evidently meaning some agreed plan of coordination of switching and plant operations. Whatever the plan might be, it necessarily would require the supervision of some one empowered to direct operations; and naturally, the management of the plant would be the logical authority in order that the plant might be conducted in an orderly, systematic manner. In short, plant operations must be under unified control. Where an arrangement for the carriers to perform the service under the supervision of the industry is necessary, so as to make it practicable for them to perform it, the switching loses its character as a terminal service and becomes a plant operation. Carriers, to perform the full measure of their duty under line-haul rates, are not required to stand ready with a switch engine at all times to answer the call of an industry to spot cars within its plant.

The testimony might have been more elaborate, more in detail, more conclusive; indeed, the Commission might have arrived at a different conclusion, but that is not the question before us. *Florida, et al.* v. *United States et al.*, 282 U. S. 194. The record is not barren of testimony to support the findings of the Commission; to the contrary, there is very substantial evidence to support them. It is obvious from the physical facts contained in exhibit 'B, from the oral testimony above quoted and from much other evidence in the record that there is such interruption, due to the classification of the coal, the weighing of the cars, the intraplant

switching, the necessity of the co-ordination of terminal and plant switching under the supervision of the industry, as to show very clearly that the service is not a part of the transportation required of the carriers, but is a plant operation. Therefore, the second contention of the petitioner must be decided against it.

It is urged that the Commission abused its discretion in denying a petition for rehearing. The supplemental report of the Commission dealing with the petitioner's plant was made June 24, 1935. A "petition for reconsideration" was filed with the Commission which, in effect, sought a reversal on the record already made and which was denied. A "petition for rehearing, reconsideration, further hearing and modification of the order in view of changed conditions" was filed with the Commission on March 12, 1936, and this petition was denied on May 4, 1936. The original bill was filed in this court August 7, 1935, when the petition for "reconsideration" was pending before the Commission. The preliminary injunction was denied August 14, 1935. On September 18, 1936, after the second petition had been denied by the Commission, a supplemental bill was filed in this court alleging the facts pertaining to the denial of the petition for a rehearing by the Commission. However, abuse of discretion by the Commission is not alleged.

To show a "changed condition" it was alleged in the petition to the Commission that (1) the practice of weighing inbound cars had been discontinued, (2) the weighing of outbound cars was continued solely for the benefit of the carriers and might be done by the carriers, (3) that by coopera-

tion between the petitioner and the carriers interference could be eliminated in the switching of cars from the interchange tracks to points within the plant if the carriers performed the service, (4) that if the carriers performed the service they would not be required to "feed" the cars to the plant to meet the requirements of the operations, (5) that the carriers could perform the service without interference, and (6) that to deprive the petitioner of such service would be a discrimination against it and a preference to other industries. Manifestly, this petition consisted largely of conclusions, arguments and proposals.

After the hearings had been held before the Commission, the proceeding closed, the case submitted, the reports made, after the petition for a "reconsideration" had been denied and after suit had been commenced in this court, the petitioner then asked that the proceeding before the Commission be reopened; and, in effect, that it be allowed a new trial on its representation that it could show a state of facts that would entitle it to more favorable results. Such procedure would not be conducive to the termination of litigation and it is not the procedure in the courts or before the Interstate Commerce Commission. The petitioner does not contend that it did not have a full, fair hearing or that it was deprived of an opportunity to present its testimony. The granting or denial of the petition for a hearing is a matter for the discretion of the Commission, *49 U. S. C. A., Sec. 16a;* and we are convinced that there was not such abuse of discretion as to justify setting aside the order. *United States* v. *Northern Pacific Railway Company*, 288 U. S. 490.

It has also been contended on behalf of petitioner that the carriers are required to perform such spotting service here involved by a universally established custom and usage. There is no such custom and usage under the facts presented by the record in this case; indeed, the evidence is decidedly to the contrary. In analyzing the decisions bearing on this phase of the controversy, it is necessary to note the decisive question of fact, always involved, as to the point where transportation ends and industrial operations begin, pointed out in the *Los Angeles Switching Case, supra,* and the *New York Central & Hudson River Railroad Company* v. *General Electric Company, supra.* When this is done it is obvious that only in exceptional instances and in comparatively limited areas have certain industries been favored with allowances.

The injunction is denied and the petition dismissed for want of equity.

BOOTH, Circuit Judge, concurs in the foregoing opinion.

SANBORN, Circuit Judge, dissenting.

The issue in this case, reduced to its simplest terms, is whether, under the evidence, the service of switching and spotting cars within the plant of the petitioner is a terminal service which the carriers are obligated to perform under their line-haul rates, or whether it is a plant service not covered by the line-haul rates. The Interstate Commerce Commission is of the opinion that it is a plant service, and the industry believes that it is a reasonable and customary terminal service. It may be conceded that if, under the evidence upon which the Commission's findings and order are based, this question of

fact is doubtful or debatable, rather than purely speculative, the Commission's order should stand. I am unable to convince myself that the evidence justifies a finding or inference that there are interferences or obstacles to the performance by the carriers of switching and spotting service for the industry which converts what would otherwise be a terminal service into a plant service. It seems to me that the evidence tends to establish that the performance by the carriers of terminal service for the industry would not be any more burdensome than similar services performed by these carriers for other smaller industries connected with the carriers' lines by the spur or industrial tracks. It is not my understanding that a carrier is entitled to spot cars at any industry at the carrier's sole convenience. Obviously, spotting service performed by a carrier on an industry track which serves two or more industries or which is used by two or more carriers must be done under some arrangement between the carriers and industries. Where such an arrangement is practical, the fact that a carrier is obliged to consult the convenience of an industry or that of another carrier in delivering and spotting cars, should not ordinarily excuse the performance of a terminal service which is covered by the line-haul rates. Demurrage rules take care of unreasonable delays in accepting delivery. While the evidence indicates that this industry weighed cars handled by it after they were received from the carriers, there is no evidence that if the carriers had been required to perform the terminal service, the industry would have insisted upon the cars being weighed by them or would have refused to

compensate them for weighing such cars as were required to be weighed. The fact that the Interstate Commerce Commission denied a rehearing, asked for by the petitioner because weighing of cars in the plant had been dispensed with, is some indication that the weighing of cars was not regarded by the Commission as a matter of controlling importance.

If the evidence, taking that view of it most favorable to the Commission, is as consistent with the hypothesis that the terminal services which the petitioner insists that the carriers must either perform or pay for are reasonable and customary terminal services covered by the line-haul rates, as with the hypothesis that they are plant services not covered by the line-haul rates, it (the evidence) tends to establish neither hypothesis, but leaves the question in the realm of conjecture. *Ewing* v. *Goode* (C. C. S. D. Ohio) 78 F. 442, 444; *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Stevens* v. *The White City*, 285 U. S. 195, 204; *Eggen* v. *United States* (C. C. A. 8), 58 F. (2d) 616, 620; *Deadrich* v. *United States* (C. C. A. 9), 74 F. (2d) 619, 622; *Claywell* v. *Inter-Southern Life Ins. Co.* (C. C. A. 8) 70 F. (2d) 569, 571; *Svenson* v. *Mutual Life Ins. Co.* (C. C. A. 8), 87 F. (2d) 441, 443.

I think that the order of the Commission should be enjoined for the sole reason that the evidentiary base on which it rests is too weak to support it.

U. S. GOVERNMENT PRINTING OFFICE 1937